APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A.V. COSTANTINI, d/b/a UNITED TRAVEL SERVICE, Petitioner, vs. CIVIL AERONAUTICS BOARD, Respondent Respondent.	No. 80-7754 MEMORANDUM Filed April 7, 1982

Petition for Review of an Order of the Civil Aeronautics Board
Argued and submitted October 15, 1981

Before: Wallace and Pregerson, Circuit Judges, and Byrne, District Judge.*

Costantini petitions this court, pursuant to 49 U.S.C. Section 1486, to review Order No. 80-11-10 of the Civil Aeronautics Board ("CAB"), adopted November 3, 1980. That order affirmed the dismisal,

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* Honorable William Matthew Byrne, Jr., United States District Judge for the Central District of California sitting by designation.

by the Director of the CAB's Bureau of Consumer Protection, of three complaints Costantini had filed with the CAB in May 1980. Costantini's complaints alleged various violations of section 411 of the Federal Aviation Act, 49 U.S.C. Section 1381.

Section 411 authorizes the CAB to investigate third-party allegations of "unfair or deceptive practices or unfair methods of competition" in the air transportation industry "if it considers that such action by it would be in the interest of the public" (emphasis added). Thus, "the Board's jurisdiction to initiate an investigation under Section 411 is premised on a finding that the 'public interest' is involved." Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 302 (1976).

Here, however, the CAB determined that an investigation of the allegations in Costantini's complaints would not be in the public interest. We do not conduct an

independent investigation to see whether the CAB's determination was correct, we ask only whether "the Board has stayed within its jurisdiction and applied criteria appropriate to that determination." American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79, 85 (1956). The criteria on which the CAB based its determination here are: (1) petitioner's disputes are essentailly private; (2) they have already been the subject of several prior(and fruitless) judicial and administrative proceedings; and (3) any need for a broad inquiry into the travel agency business is satisfied by the CAB's ongoing review of the entire marketing structure of air transportation. These criteria are entirely appropriate. The CAB did not abuse its discretion in dismissing petitioner's complaints. See REA Express, Inc. v. CAB, 507 F.2d 42, 45 (2nd Cir. 1974).

Furthermore, we have examined, and we

reject, petitioner's contentions that errors by the CAB mandate reversal of its order. In Particular, the CAB did nothing improper in considering judicial and administrative dispositions of petitioner's previous complaints, nor did it rely on the doctrine of res judicata. Petitioner's contentions are equally without foundation.

The order of the Civil Aeronautics Board is AFFIRMED.

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A.V. COSTANTINI, d/b/a UNITED TRAVEL SERVICE, Petitioner, vs. CIVIL AERONAUTICS BOARD	No. 80-7754 Filed May 25, 1982 ORDER

Before: WALLACE AND PREGERSON, Circuit Judges, and BYRNE, District Judge*

The petition for rehearing is denied.

*Honorable William Matthew Byrne, Jr., United States District Judge for the Central District of California, sitting by designation.

APPENDIX C

Order 80-11-10

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 3rd day of November, 1980

Served Nov 5,1980

A.V. Costantini, d/b/a/ United Travel Service,et al.	Dockets 37917
v.	38211
Trans World Airlines, Inc., et al.,	38233

ORDER

This matter is before the Board on the motion of A.V. Costantini for review of the decision of the Director of the Bureau of Consumer Protection (Order 80-6-21) dismissing three third-party complaints. The complaints comprise the latest chapter in Costantini's longstanding claim that several certificated air carriers, the Air Traffic Conference

(ATC), and the International Air Transport Association (IATA) unlawfully frustrated his plans for continuation and nationwide expansion of his former travel agency business. In the first of the three complaints, Costantini alleged that Trans World Airlines (TWA) made false statements to ATC,IATA and the Board that the branch offices of Costantini's travel agency were being sold as franchises and were under a different ownership than the parent office. The remaining two complaints allege that ATC and IATA relied on the assertedly false statements as a basis for denying Costantini's applications for ATC andIATA accreditation of his branch offices, that they failed to advise Costantini that his applications for accreditation were being disapproved for that reason, and that ATC and IATA

thereby breached the terms of the Board approved ATC and IATA agreements requiring that the organizations give full notice of their reasons for disapproving an application for accreditation.

Costantini's motion to review the Director's dismissal order was filed on June 30, 1980. Answers have been filed by ATC and IATA. We have considered the motion for review and the responses thereto and have decided to take review; however, we will dismiss the complaints.

On review, Costantini charges that the Director concluded erroneously that the complaints involved a purely private dispute between Costantini and the respondents which should be resolved in other forums. He argues that the allegations raised are of concern to the Board and the public and therefore war-

rant institution of an enforcement proceeding. We conclude, however, that the Director's dismissal is justified regardless of whether or not the gravamen of the complaints can be considered as a purely private dispute.

In his dismissal order, The Director also concluded that it would not be in the public interest to "expend[] our scarce enforcement resources ***to pursue allegations about incidents allegedly occurring seven years ago***"(Order 80-6-21 at 2). We fully agree, and believe that this conclusion is dispositive of the complaints.

Our enforcement resources are limited, and we simply cannot conclude that the public interest would be served by an enforcement proceeding involving actions taken seven years ago under a regulatory framework which has changed substantially

since the alleged incidents occurred. Moreover, the accreditation procedures of ATA and IATA are presently under review in the ongoing investigation into the Competitive Marketing of air transportation in Docket 36595. Finally, our public interest conclusion is reinforced by the fact that Costantini has pursued his claims against the air carrier industry in federal district court and was unable to prove any of his allegations.1/

Accordingly,

1. We grant the Motion of A.V. Costantini for review of Order 80-6-21.

2. We dismiss the enforcement pro-

1/ See, A.V. Costantini v. Trans World Airlines, Inc. et al. No. C-80-0333-WWS; (N.D. Cal.,1980) dismissed on ground of res judicata; Costantini,et al. v. Air Transport Association of America, et al., No. C-74-0365-SAW (N.D. Cal,,1974); Costantini, et al. v. Air Transport Association of America,et al., No. C-75-2221-WHO (N.D. Cal., 1977) appeal dismissed No. 75-2221(9th Cir.,1978).

ceedings in Dockets 37917, 38211, and 38233.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

All Members concurred.

APPENDIX D

Order 80-6-21

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.
Issued Under Delegated Authority
June 4, 1980

Served June 5, 1980

A.V. Costantini, d/b/a United Travel Service, et al.	Dockets
v.	37917,
Trans World Airlines, Inc., et al.	38211,
	38233

ORDER DISMISSING COMPLAINTS

Before us for consideration are three new third-party complaints of Mr. A.V. Costantini of Daly City, California. In them, he raises the now all too familiar assertion that the Air Traffic Conference (ATC), the International Air Transport Association (IATA), and one or more airlines, in this instance, Trans World Airlines, have unlawfully frustrated his plans for continuation and nation-wide expansion of his former travel agency

business. 1/Specifically, he asserts that the repondents prevented him from opening certain branch offices in Montgomery Ward Stores in 1973, allegedly in contravention of Section 411 of the Federal Aviation Act.

Where a third-party complaint alleges a violation of Section 411, there must be a showing that the public interest is affected; the Supreme Court has ruled that Section 411 cannot be employed to vindicate purely private ends. American Airlines, Inc.,Inc. v. North American Airlines, Inc., 351 U.S. 79 (1956); Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 301-304 (1976).

1/ Costantini's dispute with the certificated air carrier industry has been before the Board on repeated occasions since 1975, when ATC first placed Costantini's agency, United Travel Service, in default. See. e.g., Dockets 28116, 28250, 29716, 33349, 33700, 33917, 23909, 35144, 35940, 37917, 38211,and 38233; Orders 77-8-64 (August 16, 1977), 79-9-113(September 20,1979), 79-12-173(December 26, 1979), 80-3-118 (March 20, 1980), and 80-5-11 (May 1, 1980).

The allegations in these complaints, however, represent nothing more than a relentless continuation of Costantini's long-standing private dispute with the airline industry. The Board has made it clear that this dispute should be pursued in other forums--arbitration procedures or the courts. See Orders 77-8-64, 79-9-113, and 80-5-11. We see no reason to depart from this policy particularly on claims for which the complainant has already sought relief and lost in court.2/ Moreover, the public inter-

2/ Costantini's Montgomery Ward branch offices were the subject matter of an action for $94 million in actual and exemplary damages brought in Federal discourt shortly before the substantially identical allegations were made in his complaint for declaratory and injunctive relief from the Board, filed March 24, 1980 in Docket 37917. See A.V. Costantini d/b/a United Travel Service, d/b/a Ward's Travel Service v. Trans World Airlines, Inc. and Does I through XC, No. C-80-0333-WWS (N.D. Cal 1980). On April 16, 1980 (before Costantini filed his further complaints in Dockets 38211 and 38233), the court dismissed this case on grounds of

est would not be served by expending our scarce enforcement resources now to pursue allegations about incidents allegedly occurring seven years ago, especially in view of the major changes that have been made in the regulatory framework under which the Board operates and the fact that the branch office appointment procedures of ATC and IATA are under review in the on-going investigation into the competitive marketing of air transportation in Docket 36595.

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res judicata, finding that the matter had been disposed of in prior cases, namely, Costantini et al. v. Air Transport Association of America, et al., No. C-74-0365-SAW (N.D. Cal. 1974), and Costantini et al. v. Air Transport Association of America, et al., No. C-75-2221-WHO (N.D. Cal., judgment entered September 30, 1977), appeal dismissed, No. CV-75-2221 (9th Cir., 1978). See also, Trans World Airlines, Inc. v. United Travel Service, et al., No. 718-979 (Calif. Super.Ct., December 4, 1978) (Judgment entered for $205,185 plus costs). We note that Mr. Costantini also initiated arbitration proceedings on this matter in 1973, from which he voluntarily withdrew; see answer filed by Air Traffic Conference in Docket 33349.

Accordingly, by authority delegated under Rule 205 of the Board's Rules of Practice (14 C.F.R. 302.205), we dismiss these complaints.

Within 21 days after service of this order, the complainant may file a motion under Rule 205 to request review by the Board. If no such motion for review is filed within that period, this order will become final 30 days after the service date unless the Board takes review on its own initiative before then.

By Reuben B. Robertson

Director

Bureau of Consumer Protection

PHYLLIS
PHYLLIS T. KAYLOR
Secretary

APPENDIX E

5 U.S.C. Section 554(c)

(c) The agency shall give all interested parties opportunity for-

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title [5 USCS Sections 556 and 557].

APPENDIX F

49 U.S.C. Section 706(2)(D) and (F)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(D) without observation of procedure required by law;

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

APPENDIX G

49 U.S.C. Section 1302(a)(3)

(a) General factors for consideration. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(3) The availability of a variety of adequate, economic, efficient, and low-priced services by air carriers and foreign air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers, and the need to encourage fair wages and equitable working conditions for air carriers.

APPENDIX H

49 U.S.C. Section 1472(e)

Failure to file reports; falsification of records. Any Air carrier, or any officer, agent, employee, or representative thereof, who shall knowingly and willfully, fail or refuse to make a report to the Board or Administrator [Secretary of Transportation] as required by this Act, or to keep or preserve accounts, records, and memoranda in the form and manner prescribed or approved by the Board or Administrator [Secretary of Transportation], or shall knowingly, and willfully, falsify, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file any false report, record, or memorandum, shall be deemed guilty of a misdemeanor and, upon conviction thereof, be subject for each offense to a fine of not less than $100 and not more than $5,000.

APPENDIX I

49 U.S.C. Section 1482(a)

Filing of complaints; complaints against members of the Armed Forces. Any person may file with the Administrator [Secretary of Transportation] or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of theis Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator [Secretary of Transportation] or the Board to investigate the matters complained of. Whenever the Administeator [Secretary of Transportation] or the Board is of the opinion that any complaint does not state facts which warrent an investi-

gation or action, such complaint may be dismissed without hearing In the case of complaints against a member of the Armed Forces....(remainder of text not applicable)

APPENDIX J

49 U.S.C. Section 1485(e) and (f)

(e) Compliance with orders. It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Admiistrator [Secretary of Transportation] or the Board under this Act affecting such person so long as the same shall remain in effect.

(f) Findings of fact; service of orders. Every order of the Administrator [Secretary of Transportation] or the Board shall set forth the findings of fact upon which it it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

APPENDIX K

14 C.F.R. Section302.204(b)

Within fifteen (15) days after service of a third-party complaint, each person complained of shall file an answer in conformance with and subject to the requirements of Section 302.207(b). Extensions of time for filing an answer may be granted by the Director of the Bureau of Consumer Protection for good cause shown.

APPENDIX L

14 C.F.R. 302.207(b)

All answers shall conform to the requirements of Section 302.8(a)(2) and shall fully and completely advise the parties and the Board as to the nature of the defense and shall admit or deny specifically and in detail each allegation of the complaint unless the person complained of is without knowledge, in which case, his answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered and shall, in the absence of a reply, be deemed to be contoverted.

APPENDIX M

14 C.F.R. Section 302.208

Failure of a respondent to file and serve an answer within the time and in the manner prescibed by this part shall be deemed to authorize the Board, in its discretion, to proceed to take proof, without notice, of the allegations or charges set forth in the complaint or order, provided that the Board or administrative law judge may permit late filings of an answer for good cause shown.

PROOF OF SERVICE

I, the undersigned, that I caused a true copy of the foregoing PETITION FOR WRIT OF CERTIORARI, to be mailed this date, first-class postage prepaid, to all persons required to be served, who are as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

William F. Baxter, Ass't Attorney General

Barry Grossman, Attorney

Susan J. Atkinson, Attorney

Civil Aeronautics Board
Washington, D.C. 20428

David M.Kirstein, General Counsel

Michael Schopf, Deputy General Counsel

Glen M. Bendixsen, Associate General Counsel,Litigation

J. Thomas Ezell, Attorney

I declare under penalty of perjury that the above is true and correct.

Executed at Daly City, California on August 20, 1982

A.V. Costantini